



Employment Law Alert

Biometrics in the Workplace

By: David Limekiller

August 29, 2018

Biometrics has a long history of use in the workplace, particularly fingerprints, which are commonly used to conduct background checks in the fields of law enforcement and medicine. However, as biometric technology continues to improve, it has become a valuable tool to employers and is increasingly becoming the norm in the workplace. Common uses by employers include:

- **Timekeeping** such as using fingerprints or hand scans to punch in and out on biometric timeclocks.
- **Electronic security and building access** by employing retina scans, facial recognition, or fingerprinting technology to control employee access to specific areas of an employer's facilities.
- **Accessing workplace equipment** through facial recognition or fingerprinting technology to control access to computer systems, smartphones and other devices.

The use of biometrics in the workplace is an evolving area of employment law and this uncertainty presents challenges to an employer's efforts to implement proper procedures for a biometric program. Currently, no single federal statute establishes specific guidelines regarding an employer's obligations pertaining to the collection, use, or retention of biometric information. Likewise, only several states have passed laws to regulate biometric privacy in the workplace.

Oklahoma is among the states that have not enacted any statutes or regulations regarding biometrics in the workplace. However, the absence of statutory authority does not protect an employer from claims regarding biometric data. An employer is still subject

to common law claims such as right to privacy or negligence relating to how an employee's biometric data is collected, protected, used, displayed, or retained. In the absence of statutory guidelines, employers are recommended to work with counsel to create policies and procedures to minimize potential liability. The policies should provide full disclosure to the employees regarding the use and disclosure of their biometric information so that employees can give their informed consent to the employer.

To avoid and defeat right to any privacy claims, it is suggested that any policy for any biometric system include the following:

1. Clearly inform your employees why the biometric system is needed. For example, for timekeeping, a biometric system will avoid fraudulent claims, prevent "buddy punching," and will create the best evidence for an employer to defend wage and hour and related claims

2. Obtain written consent from employees to use the biometric data and specify the permitted uses.

3. Other laws apply to biometric data so develop alternative policies to accommodate employees who refuse to participate for religious reasons or are unable to participate because of disability or injury.

4. Do not sell, license, or transfer any biometric data to any third party without the employee's prior written consent. In other words, do not profit from your employee's biometric data.

5. Protect the biometric data to at least the same degree you protect your trade secrets and other confidential information. If technically possible, use encryption.

6. Develop a written policy on retaining and destroying biometric data and communicate the policy to employees before they give consent.

7. Ensure there are no disclosures of biometric data to any third parties without employee consent, or as required by law.

8. Any disclosure of biometric data to law enforcement shall be through a warrant or subpoena.

9. Create a plan to respond to a data breach.

10. Have counsel review all contracts with any third parties who will have access to the biometric data to ensure that the biometric data will not be disclosed or misused.

11. Work with counsel to monitor developments in the law.

David Limekiller is an attorney in GableGotwals' Labor & Employment Practice Group and in the Firm's Banking Practice Group.



David Limekiller
(918) 595-4854
dlimekiller@gablelaw.com

GableGotwals * 1100 ONEOK Plaza * 100 West Fifth Street * Tulsa, OK 74103
www.gablelaw.com

This article is provided for educational and informational purposes only and does not contain legal advice or create an attorney-client relationship. The information provided should not be taken as an indication of future legal results; any information provided should not be acted upon without consulting legal counsel.